A **MERIDIAN ASSET MANAGEMENT SDN BHD**

**v.**

**ONG KHENG HOE & ORS**

B COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
[CIVIL APPEAL NO: W-02-1204-2006]
C 14 MARCH 2008

***CIVIL PROCEDURE:*** *Mareva injunction - Ancillary tracing order - Appeal against discharge of - Whether tracing order would increase defendants' risk of being exposed to criminal charges - Whether defendants* D *risked self-incrimination by disclosure of information demanded*

This was the plaintiff's appeal against the High Court's discharge of the tracing order requested by the plaintiff against the defendants. The tracing order was one of the ancillary orders requested by the plaintiff in its application for a mareva injunction E against the defendants.

**Held (allowing the appeal in part)**
**Per James Foong JCA delivering the judgment of the court:**

F **(1)** What was requested of the 1st defendant in the tracing order did not increase his risk of being exposed to a criminal charge. The 1st defendant was already charged for cheating and falsification of documents. Further, his properties had been seized on the suspicion that they were secured from moneys G derived from money laundering. Prior to that, the authorities had obtained information from him on the movements of his funds. Therefore, what he had to disclose in the civil suit was nothing more than what he had already told the authorities who possibly had used some of the information to frame the H criminal charge against him or might even use them to support the filing of further charges. Therefore, the information requested by the plaintiff in the tracing order added no further weight to what the 1st defendant was already exposed to. In short, his risk towards that impediment by the disclosure I demanded had not materially increased. (para 18)

**(2)** The other defendants were not in the same situation as the 1st defendant. There was no information of whether the 2nd, 3rd or 4th defendants were charged for any criminal offence or that their properties seized and information on the movement of their funds divulged to the authorities. As such, the 2nd, 3rd and 4th defendants do risk self incrimination by the disclosure of the information demanded and such risk must be safeguarded. (para 19)

*[High Court order relating to discharge of tracing order in respect of 1st defendant set aside; order remained effective against other defendants.]*

***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan plaintif terhadap keputusan Mahkamah Tinggi yang menolak perintah mencari yang dipohon oleh plaintif terhadap defendan-defendan. Perintah mencari adalah salah satu dari perintah-perintah sampingan yang dipohon oleh plaintif dalam permohonan injunksi marevanya terhadap defendan-defendan.

**Diputuskan (membenarkan sebahagian rayuan)**
**Oleh James Foong HMR menyampaikan penghakiman mahkamah:**

**(1)** Apa yang dipohon terhadap defendan pertama melalui perintah mencari tidak meningkatkan risiko keterdedahan beliau kepada pertuduhan jenayah. Defendan pertama sudah pun dituduh dengan tuduhan melakukan penipuan dan pemalsuan dokumen. Selain itu, harta-harta beliau telah dirampas atas persangkaan bahawa ia diperolehi melalui wang haram. Sebelum itu, pihak berkuasa juga telah mendapat maklumat dari beliau berkaitan pergerakan dananya. Oleh itu, apa yang perlu didedahkan oleh beliau di dalam guaman sivil adalah tidak lebih dari apa yang sudah pun diberitahu oleh beliau kepada pihakberkuasa, yang berkemungkinan telah menggunakan sebahagian dari maklumat tersebut untuk membuat pertuduhan jenayah terhadapnya atau mengajukan pertuduhan-pertuduhan baru yang lain. Oleh itu, maklumat yang dipohon oleh plaintif di dalam perintah mencari tidak menambah apa-apa kepada apa yang defendan pertama sudah pun terdedah. Pendek kata, pendedahan yang dituntut secara materialnya tidak menambah risiko beliau terhadap kemudaratan itu.

A (2) Defendan-defendan lain tidak berada dalam kedudukan yang sama seperti defendan pertama. Tiada maklumat sama ada defendan-defendan kedua, ketiga dan keempat dituduh dengan apa-apa kesalahan jenayah atau bahawa harta-harta mereka telah dirampas dan maklumat mengenai pergerakan dana
B mereka telah diberi kepada pihakberkuasa. Oleh yang demikian, defendan-defendan kedua, ketiga dan keempat menghadapi risiko 'self-incrimination' jika mendedahkan maklumat yang dituntut di mana risiko tersebut perlu dilindungi.

C *[Perintah Mahkamah Tinggi berkaitan pengguguran perintah mencari berhubung defendan pertama diketepikan; perintah terhadap lain-lain defendan masih berkuatkuasa.]*

**Case(s) referred to:**
*Khan v. Khan [1982] 2 All ER 60* ***(refd)***
D *PMK Rajah v. Worldwide Commodities Sdn Bhd & Ors [1985] 1 MLJ 86* ***(refd)***
*Riedel-de Haen AG v. Liew Keng Pang [1989] 2 MLJ 401* ***(refd)***

**Legislation referred to:**
E Evidence Act 1950, s. 132(1)

*For the plaintiff/appellant - Gideon Tan (Vincent Tan with him); M/s Gideon Tan Razali Zaini*
*For the defendants/respondents - Kamarul Hisham Kamaruddin (Hasnal Rezua Merican with him); M/s The Chambers of Kamarul Hisham &*
F *Hasnal Rezua*

*[Appeal from High Court, Kuala Lumpur; Suit No: D8(D6)-22-1394-2005]*

*Reported by Usha Thiagarajah*

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## JUDGMENT

### James Foong JCA:

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### Introduction

**[1]** This is an appeal against the decision of the High Court dated 18 October 2006 in respect of an application by the plaintiff for principally a Mareva Injunction with ancillary orders. One of the ancillary orders requested (prayer (f)) in the plaintiffs' application is what is generally known as the tracing order. It is worded in this form:

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all the Defendants herein, respectively shall by way of an affidavit to be filed and served seven (7) days after this Order has been served provide a detailed account of to whom and where the sum of RM27,606,169.65 which is money belonging to the Plaintiff's clients was subsequently disbursed to.

**[2]** The High Court after hearing the plaintiff's application *inter parte*, discharged this tracing order, thus this appeal.

## Ground For Refusal By The High Court

**[3]** As no ground of decision is provided by the High Court for discharging this tracing order, we have to rely on the appeal record and the submissions of the parties to ascertain the rational for this discharge. We believed it was based on the claim by the defendants that they are entitled to the privilege against self incrimination ie, that by disclosing what is requested of them in the tracing order may criminate them to criminal offence.

## Background Facts

**[4]** For ease of reference, we shall refer to the parties in this judgment in their original capacity: plaintiff and defendants respectively.

**[5]** The plaintiff is and was at all material times engaged in the business of asset/fund management. The 1st defendant was the plaintiff's employee who held the position as central dealer in the plaintiff. The plaintiff alleged that the 1st defendant, in breach of his duties, fraudulently utilized, converted, stole and/or misappropriated funds managed by the plaintiff amounting to RM27,606,169.65 over a period of three to five years. And these funds were transferred to the 1st defendant's sisters: 3rd and 4th defendants. Further, according to the plaintiff, the 1st defendant and his wife, the 2nd defendant, are attempting to abscond with these embezzled monies.

**[6]** On 26 September 2005, the plaintiff filed a civil suit in the High Court at Kuala Lumpur against all the defendants and simultaneously applied for an *ex parte* Mareva injunction against them with ancillary orders which included the tracing order. This was duly granted by the High Court but as disclosed, upon subsequent *inter parte* hearing, the tracing order (prayer (f) in the plaintiff's application) was discharged.

## Legal Test To Be Applied

**[7]** Accepting that this privilege against self incrimination survives in our Common Law, and the exception to this as provided in s. 132(1) of the Evidence Act is not applicable to the defendants since they are not considered as "witnesses" within the meaning of this section – see *P.M.K. Rajah v. Worldwide Commodities Sdn Bhd & Ors* [1985] 1 MLJ 86 and *Riedel-de Haen AG v. Liew Keng Pang* [1989] 2 MLJ 401, the appellant urged us to accept and apply the test enunciated in *Khan v. Khan* [1982] 2 All ER 60, to ascertain whether such privilege applies to the defendants.

**[8]** The test laid down in *Khan v. Khan (supra)* can be derived from the judgments of Stephenson LJ and Griffiths LJ when they dismissed the appeal before them.

**[9]** Stephenson LJ said:

> So far I have assumed that compliance with the order would tend to expose the first defendant to the risk of criminal proceedings or would materially increase that risk. But I do not consider that the first defendant is entitled to the benefit of so unrealistic an assumption ... He would already be exposed to the risk of criminal proceedings for theft and perhaps forgery, and what he may have to say about the subsequent disposal of the Pounds 40,000 adds nothing of substance to that existing risk.

**[10]** Griffiths LJ added:

> For the purposes of assisting the plaintiff to trace the money, it is of the utmost importance that the first defendant should be required to swear an affidavit setting out what has become of it since it entered the account of his company. As the first defendant admits that he paid the Pounds 40,000 to the second defendant company, any information that he can give about the subsequent whereabouts or use of the money cannot add a pennyweight to the strength of the criminal case against him. Accordingly, in my opinion to require him to swear the affidavit in the form ordered by the judge would not tend to incriminate him either in the sense of setting up a case against him or strengthening an already existing case.

**[11]** In essence, this proposition amounts to this: if there is evidence that the defendant is already exposed to the risk of criminal proceedings then the demand for disclosure under the tracing order could not materially add to the existing risk faced by the defendant; thus such privilege would not apply. We find this

proposition rational for application to this instant case. Further, we are of the view that there should be no distinction in the application of this proposition in an application for a tracing order made under a Mareva injunction with that made with an Anton Pillar Order.

**[12]** The factual matrix in *Khan v. Khan (supra)* is as follows: The plaintiff gave blank signed cheques to the 1st defendant allegedly for the purpose of paying on his behalf the balance of the purchase price for a property purchased by him. Instead of paying on behalf of the plaintiff the balance of the purchase price, the 1st and 2nd defendants used the money for other purposes. The 1st defendant had made out these cheques for £40,000 in favour of the 2nd defendant, a company controlled by him. This prompted the plaintiff to bring an action against these two defendants for damages for breach of trust, as well as for the return of the money including how it was applied. Before the case was heard, the plaintiff obtained an *ex parte* tracing order against both these defendants.

**[13]** These defendants applied to set it aside in the High Court. They were unsuccessful. They appealed to the Court of Appeal and their appeal was dismissed. At the hearing in the Court of Appeal, the 1st defendant argued that if the tracing order is allowed to continue, it would incriminate him for offences under the Thief Act and Forgery Act.

## Application Of Test To The Facts

**[14]** Though not disclosed in the affidavits of the parties, from the submission of the defendants at the hearing in the court below, the following information are revealed:

**[15]** Paragraph 1.4 of the defendant's written submission says:

> It is an undisputed factual matrix relevant to this application that the 1st defendant has since the inception of this application been charged with the total of 60 charges, being, 30 charges under s. 420 of the Penal Code (Cheating) and 30 charges under s. 471 of the Penal Code (Using a Forged Document as Genuine).

**[16]** Then in para. 1.5 of the same submission:

> It is further undisputed that investigation has commenced under the Anti-Money Laundering Act (AMLA) for possible offences therein, and that acting under powers of investigation (ss. 44, 45 (2), and 51(1) AMLA), the prosecution has proceeded to seize certain moveable and immovable properties belonging to the 1st defendant, suspected to have been concerned in, or being the subject matter of, the offence under the said Act.

**[17]** And finally in para. 1.6 of the same submission:

> It is undisputed that investigation has begun under the Securities Commissions Act (SCA) 1993, and Securities Industries Act 1983 and that from 8th November 2005 to 11th November 2005, the 1st defendant's statements have been recorded under s. 134(1)(b) of the SCA 1993 and that certain information regarding details of his bank accounts and statements have been ordered to be produced under s. 128(5) SCA 1993 on 14th November 2005.

**[18]** By these revelations, it is our view that what is requested of the 1st defendant in the tracing order does not increase his risk of being exposed to a criminal charge. The 1st defendant has already been charged for cheating and falsification of documents. On top of that, his properties had been seized on the suspicion that they were secured from monies derived from money laundering. Prior to this, the authorities had obtained information from him on the movement of his funds. Thus, what he has to disclose in this civil suit is nothing more than what he has already told the authorities who, possibly, had used some of the information to frame the criminal charge against him or may even use them to support the filing of further charges. Therefore, the information requested by the plaintiff in the tracing order adds no further weight to what the 1st defendant is already exposed to. In short, his risk towards this impediment by the disclosure demanded has not materially increased.

**[19]** However, on the other hand, we cannot say the same of the other defendants. They are not in same situation as the 1st defendant, or at least we have no knowledge of. There is no information of whether the 2nd, 3rd or 4th defendants were charged for any criminal offence or that their properties seized and information on the movement of their funds divulged to the authorities. All the information we have is of the 1st defendant. Very little is disclosed of these other defendants. In the light of this, we are of the view that the 2nd, 3rd and 4th defendants do risk self incrimination by the disclosure of the information demanded and such risk must be safeguarded.

## Conclusion

**[20]** For reasons aforesaid, we allow this appeal in part. The order of the High Court dated 18 October 2006 relating to the discharge of the tracing order is set aside in respect of the 1st defendant. This order remains effective against the other defendants.

**[21]** There shall be costs for this appeal against the 1st defendant to be paid to the plaintiff. Deposit for this appeal to be refunded to the plaintiff.